IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-260

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, *Appellant*,

v.

PATRICK J. CUNNINGHAM, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLEE CUNNINGHAM

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COUNTERSTATEMENT OF THE CASE

The bare outline of procedural events and of statutory provisions in the appellant's Statement is accurate, so far as it goes.

Appellee Patrick J. Cunningham is indeed a party officer, being a member and chairman of the State and Bronx County Democratic Committees. He was elected by the suffrage of enrolled members of the Democratic

Party. N.Y. Election Law §§ 12, 13, 15; Rules of the Democratic Party of New York, Art. II, § 1, Appendix, p. 37. New York law requires that he be an enrolled Democratic Party voter in order to be eligible to serve on the respective committees. N.Y. Election Law § 12.

The Democratic Party in New York fulfills, as appellant's brief points out, some public functions. It is, however, principally a private political organization. As the Court of Appeals for the Second Circuit said in describing the functions of the Kings County Republican Committee:

> "Except in rare instances the county committee does not perform any electoral functions on behalf of its enrolled party members. Its function is essentially to handle the party's internal affairs at the county level, including the promotion of Republican candidates and policies for consideration by its members, development of party programs, solicitation of uncommitted voters to enroll in the Republican Party, raising of campaign funds, manning of the polls at election time, distribution of party literature, canvassing voters, electioneering, and similar activities."

Seergy v. *Kings County Republican Committee,* 459 F.2d 308, 310 (2d Cir. 1972).

Beginning in late 1975, the Deputy Attorney General in charge of investigating New York's criminal justice system began actively to criticize New York Governor Hugh Carey and persons associated with him, including appellee. The Deputy, Maurice Nadjari, who was the prosecutor who demanded in the secrecy of the grand jury that appellee execute a waiver of immunity, had been appointed during the administration of Gov-

ernor Nelson Rockefeller, a member of the same political party as appellant Lefkowitz. See generally R. Pitler, *Superseding the District Attorneys in New York City—the Constitutionality and Legality of Executive Order No. 55,* 41 Fordham L. Rev. 517 (1973). Mr. Nadjari carried the title Special Prosecutor.

On December 23, 1975, Governor Carey had announced his intention to replace Mr. Nadjari as Special Prosecutor with Robert Morgenthau, District Attorney of New York County and former United States Attorney for the Southern District of New York.[1] This choice was Governor Carey's to make. N.Y. Executive Law § 63, subd. 2.

Mr. Nadjari promptly began to supply information to the press, by public statements and by leaks, to the effect that Governor Carey was participating in a "cover up" and that appellee was a criminal. See *Report of an Investigation of Charges Made by Special Prosecutor Maurice H. Nadjari Concerning Governor Hugh L. Carey,* issued June 21, 1976, by Special Deputy Attorney General Jacob Grumet; New York Times, Dec. 26, 1975, p. 1, col. 8. The allegations concerning appellee, against whom no formal charges had ever been made, reflected a consistent practice of Mr. Nadjari's office, termed "a pattern of deliberate transgression and failed responsibility" on the part of Mr. Nadjari and his chief assistant. State of New York, Commission on Investigation, "The Nadjari Office and the Press," November 18, 1976, p. 5. See generally A. Lewis, *The Zeal of Maurice Nadjari,* New York Times Magazine, March 28, 1976, p. 15.

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[1] In fact, Mr. Nadjari was eventually replaced by John F. Keenan, the present Special Prosecutor.

Mr. Nadjari went so far as to file an affidavit stating that appellee was "at the center of the corrupt marketplace for judgeships," which was reported in a number of New York City newspapers. See, *e.g.*, New York Times, Jan. 7, 1976, p. 1; New York Daily News, Jan. 7, 1976, p. 1; New York Post, Jan. 6, 1976, p. 1. Having thus publicly denounced appellee for selling judgeships and for political corruption, Nadjari finally used the authority of his office to procure two indictments against appellee embodying the charges he had made.

On December 22, 1976, Judge Leonard H. Sandler, in a 26-page opinion, dismissed the indictments on a number of grounds, including lack of any evidence that Mr. Cunningham or the Bronx County Democratic Committee had ever received any money as a *quid pro quo* for supporting the nomination of a judge. With specific reference to Mr. Nadjari's "corrupt marketplace" allegation, Judge Sandler said:

> "[B]asic fairness requires it to be said explicitly, as indisputably established by the record of these Grand Jury proceedings, that this charge was not justified by the evidence then at his disposal, and was not substantiated by the investigation that followed."

People v. *Cunningham*, slip op., p. 25, — Misc.2d —, — N.Y.S.2d — (1976), N.Y. Law Journal, Dec. 23, 1976, p. 12, at p. 13.

On April 12, 1976, Mr. Cunningham appeared before a grand jury conducted by Mr. Nadjari. He was tendered a waiver of immunity and refused to sign it. The record does not reflect that Mr. Cunningham was ever asked a single question relating to his conduct as a party officer. Mr. Cunningham was not asked whether

or not he would testify under a grant of use immunity of the type set forth in *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 426 F.2d 619, 621 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972), nor was any attempt made, of the type set forth in that opinion, to confer such limited immunity.

The present lawsuit followed, and a unanimous three-judge court invalidated the provisions of N.Y. Election Law § 22.

SUMMARY OF ARGUMENT

This case is ruled by this Court's consistent course of decision invalidating statutes cast from the same mold as N.Y. Election Law § 22. The most recent such case is *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), in which the Court rejected the same arguments advanced by appellant here, and expressly noted that the State's concerns could be accommodated by tendering use immunity to the witness in such situations.

The determination of the three-judge court is particularly appropriate in a case such as this, in which a political appointee—Deputy Attorney General Nadjari—sought to use N.Y. Election Law § 22 to work an automatic forfeiture of party offices to which appellee was elected by the suffrage of his fellow Democrats. Substantial first amendment questions of state interference in the activities of political parties are therefore raised by the statute.

Appellee also notes that the automatic, conclusive presumption of unfitness from refusal to sign a waiver of immunity falls afoul of this Court's decision in *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), as well as of this Court's consistent refusal to validate presumptions which are conclusive or those which are irrational.

ARGUMENT

I. The Three-Judge Court Was Correct in Regarding This Case as Controlled by the Line of Authority Extending from Garrity v. New Jersey, 385 U.S. 493 (1967), to Lefkowitz v. Turley, 414 U.S. 70 (1973).

The statute at issue here is substantially the same as those construed in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), *Gardner* v. *Broderick*, 392 U.S. 273 (1968), *Uniformed Sanitation Men Ass'n* v. *Commissioner*, 392 U.S. 280 (1968), and *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973). See also *Spevack* v. *Klein*, 385 U.S. 511 (1967). Indeed, the statutes invalidated in *Gardner*, *Sanitation Men* and *Turley* were cut from the same pattern as New York Election Law § 22.

No good purpose would be served by restating, in this brief, the Court's holdings in that line of cases. However, in order to underscore that Mr. Lefkowitz misconceives the issue here, it is vital to note the doctrinal development which they represent: the principle of law formulated in *Garrity* in an opinion for five Justices was refined in *Gardner* and *Sanitation Men* so as to command the concurrence of the entire Court. Justice Harlan, for himself and Justice Stewart, concurred specially in *Sanitation Men* and *Gardner*, noting that he found in the opinions of the Court "a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices." 392 U.S. at 285. The "formula" set out by the Court in *Gardner*, 392 U.S. at 278, and in more detail in *Sanitation Men*, 392 U.S. at 284, consisted of a suggestion that a public employee might be discharged if he or she refused to answer questions specifically and narrowly addressed to matters relevant to

the performance of official duties without requiring a forfeiture of the important rights which the fifth amendment self-incrimination provision protects.

In subsequent proceedings in *Sanitation Men*, the petitioners there were given a form of use immunity, 426 F.2d at 621, and persisted in a refusal to answer proper questions. Judge Friendly, writing without the aid of this Court's later opinion in *Kastigar* v. *United States*, 406 U.S. 441 (1972) (upholding use immunity as opposed to transactional immunity); *cf.* *Piccirillo* v. *New York*, 400 U.S. 548 (1971), found the procedure adopted consistent with this Court's teaching and upheld dismissals of the recalcitrant employees from public employment. This Court denied certiorari. 406 U.S. 961 (1972).

By the time *Lefkowitz* v. *Turley*, *supra*, was decided, just three Terms ago, the entire Court was in agreement that the compulsion of a statute like New York Election Law § 22 violates the fifth amendment self-incrimination clause and that the State is not thereby left powerless to enforce its legitimate interests. 414 U.S. at 84-85. Six members of the Court held that the State could confer use immunity and exact relevant testimony, and three members hewed to the view that transactional immunity was necessary.

Mr. Nadjari declined to follow the path this Court and the Second Circuit had so clearly charted, but insisted instead upon attempting to compel appellee either to testify before the grand jury or forfeit the political positions to which he had been elected. The three-judge court responded—and quite properly—by invalidating N.Y. Election Law § 22.

Appellant seeks to answer the three-judge court by pretending that the questions settled in the *Garrity-Turley* line of cases were never decided, and by pretending to be in a dilemma which does not exist.

A. Garrity, Gardner, Sanitation Men *and* Turley *Control this Case.*

The rule of these cases was reaffirmed as recently as last Term in *Baxter* v. *Palmigiano,* 425 U.S. 308 (1976), the very case from which appellant purports to derive so much comfort.[2] The doctrine so recently reaffirmed has commanded the continued respect of this Court because it lies at the heart of the important interests which the privilege against self-incrimination has protected since the tumultuous events of the seventeenth century, marked by the forthright declarations of the Long Parliament. L. Levy, *Origins of the Fifth Amendment* (1968). Mr. Justice Stewart has summarized this history:

> "We must determine whether the petitioner has been 'compelled . . . to be a witness against himself.' Compulsion is the focus of the inquiry. . . . When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced."

[2] *Baxter* reaffirms that use immunity must be offered if the State insists upon a person's testimony:

> "Had the State desired Palmigiano's testimony over his Fifth Amendment objection, we can but assume that it would have extended whatever use immunity is required by the Federal Constitution." 425 U.S. at 318.

Griffin v. *California,* 380 U.S. 609, 620 (1965) (dissenting opinion).

The compulsion inherent in tendering the oath *ex officio* finds modern echo in N.Y. Election Law § 22. And the *automatic* assumption of guilt, or at least the *automatic* liability to serious sanctions, also present in § 22,[3] is the impermissible result of this unlawful coercion. *Baxter* v. *Palmigiano, supra.* Appellant's contrary contention can only spring from a studied indifference to constitutional history. See generally L. Levy, *supra,* and sources cited therein.

Appellant even seems to suggest that public officials do not possess fifth amendment rights. *E.g.*, Brief for Appellant, p. 12 n. ***, p. 19. This Court early settled that question. In *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 144 (1803). Attorney General Levi Lincoln was summoned to this Court's hearing on a rule to show cause and handed questions in writing concerning his conduct while Secretary of State. Lincoln objected that "he ought not to be compelled to answer any thing which might tend to criminate himself." The Court said that he was not "obliged to state any thing" incriminatory. Attempts during the colonial period to impose the oath *ex officio* procedure—or any similar

[3] Appellant concedes that the consequences—loss of party office and disqualification from public office—follow automatically, without reference to any other evidence of fitness or any consideration of why a party officer might decline to waive immunity in a secret inquisitorial proceeding run by a prosecutor with a political and personal motive to discredit him. Brief for Appellant, p. 25 n. *.

device for compelling testimony—against a public official met consistent and hostile criticism. L. Levy, *supra,* at 359-60 (case of Growdon) and 373 (case of Beekman).

Appellant argues, however, that the State's interest in the integrity of the political process and the unsalaried character of Mr. Cunningham's offices provide some basis for departing from principles of law so recently reaffirmed. This argument proves too much.

The State's interest may be great, but it may not be served by means which fall afoul of constitutional guaranties.[4] The integrity of the police, honesty in the civil service, and the scrupulous use of public works funds—all important interests—must be served, under this Court's command, only in ways which do not unconstitutionally compel testimony. The State's power to regulate the civil service and the police is, indeed, greater than its power to intrude upon the processes of campaigning for public office, running a political party, and selecting public officials. Compare *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), *Civil Service Comm'n* v. *Letter Carriers,* 413 U.S. 548 (1973), and *Kelley* v. *Johnson,* 425 U.S. 238 (1976), with *Cousins* v. *Wigoda,* 419 U.S. 477 (1975), *Buckley* v. *Valeo,* 424 U.S. 1 (1976), *Powell* v. *McCormack,* 395 U.S. 486 (1969), and *Bond* v. *Floyd,* 385 U.S. 116 (1966).

No, there are some alleged impurities which the Constitution requires be left to the alembic of public criti-

[4] The argument from interest is, moreover, absurd and ahistorical on its face. Compulsion to testify does not become more tolerable because the State's more vital concerns are at stake. Were it otherwise, the Court of High Commission and the Star Chamber would not have been abolished, but would simply have been confined to serious cases such as treason and sorcery.

cism and debate. Particularly is this so when the remedy the State proposes consists of depriving the electors, members of a voluntary political association, of the leadership and representation they have chosen, without any showing other than a refusal to waive immunity. See Point II, *infra.*

Nor can the State's characterization of Mr. Cunningham's interest as derisory withstand a moment's scrutiny. He has been and will be stigmatized by the conclusion that he is unfit for his present position and for all public offices. This principle was reaffirmed in *Board of Regents* v. *Roth,* 408 U.S. 564, 573-74 (1972). He is deprived of a first amendment right possessed by all citizens, the right of political association and to run for and hold party and political office. *Bond* v. *Floyd, supra; Powell* v. *McCormack, supra; Williams* v. *Rhodes,* 393 U.S. 23 (1968). These cases have not made a distinction between salaried and nonsalaried political positions. The fact that Mr. Cunningham may be free to pursue his law practice is irrelevant; the stigma which attaches to him from forced removal cannot but have a deleterious effect there, too.[5] See *Board of Regents* v. *Roth, supra,* 408 U.S. at 576-78.

Moreover, as we note in Point II, *infra,* the State—in stripping Mr. Cunningham of his posts and forbid-

[5] Such reasoning underlies the Court's holdings in the *Garrity-Turley* line of cases. Garrity could have become a police chief elsewhere, Gardner could have found work as a policeman in another place or as a private security guard, the sanitation men could work for a trash removal firm, and the contractors in *Turley* were free to take on as much private business as they liked. The Court found harm from the *nature* of the sanction imposed for resisting compulsion.

ding him to venture into political or party office for five years—effectively deprives the electorate of free choice.

B. The State's Purported Dilemma Does Not Exist.

The State purports, Brief for Appellant, pp. 12-13, to be forced to choose between prosecuting Mr. Cunningham and obtaining his testimony before a grand jury. No such choice is imposed upon the State. True, N.Y. Criminal Procedure Law §§ 190.40-190.45 mandate transactional immunity for grand jury witnesses who do not sign a waiver of immunity, but this is a fact which arises from New York's legislature having enacted such a provision.

More tellingly, the State has never sought to do here what it did on remand in *Sanitation Men*[6]—that is, to offer Mr. Cunningham a form of use immunity by means of a *limited* waiver, which the Court in *Lefkowitz* held would be adequate to protect against unlawful compulsion. 414 U.S. at 84-85.

II. Substantial First and Fourteenth Amendment Interests Forbid the Direct Intrusion Into the Political Process Represented by N.Y. Election Law § 22.

New York's Democratic Party and the Bronx County Committee are voluntary political associations. They have procedures for electing and for removing officers. See, *e.g.*, Rules of the Democratic Party of New York, Art. II, § 12, Appendix, p. 41; N.Y. Election Law §§ 12, 13, 15. New York Election Law § 22 states that, upon the happening of a designated event, a party officer elected according to the provisions of law by the suffrage of enrolled voters shall be stripped of his or

[6] 426 F.2d at 621.

her office and thereafter barred from party and public office. This triggering event, as dramatically illustrated by this case, may be the issuance of a grand jury subpoena at the behest of a prosecutor who is himself a political officer.

Such an interference into party and electoral affairs comes to this Court bearing a burden of justification. This Court has repeatedly struck down provisions of law and other manifestations of governmental action which restricted voter choice,[7] imposed a burden upon access to and participation in the process of running for and holding office, or otherwise infringed upon the principle that the electorate, not the State, controls the political process. *Bond* v. *Floyd, supra; Powell* v. *McCormack, supra; Williams* v. *Rhodes, supra; Buckley* v. *Valeo, supra.*

This Court has warned that these freedoms are not absolute, *Civil Service Comm'n* v. *Letter Carriers,* 413 U.S. 548, 567 (1973), but it has always stressed that when regulating concerning them the State must use the least possible power:

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose."

Shelton v. *Tucker,* 364 U.S. 479, 488 (1960), quoted in *Buckley* v. *Valeo,* 424 U.S. at 238-39 (opinion of Bur-

[7] Appellee has standing to raise the restriction of voter choice. This is a case in which the persons who voted for Mr. Cunningham, though not parties here, stand to lose. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 611 (1973).

ger, C.J.). See also *Cantwell* v. *Connecticut,* 310 U.S. 296, 304 (1940); *Lamont* v. *Postmaster General,* 381 U.S. 301, 310 (1965) (Brennan, J., concurring).[8] See also *Ripon Society* v. *Nat'l Republican Party,* 525 F.2d 567 (D.C. Cir. 1975) (*en banc*), *cert. denied,* 424 U.S. 933 (1976).

III. New York Election Law § 22 Creates an Invalid Conclusive Presumption of Unfitness for Party and Political Office.

Appellant interprets Mr. Cunningham's refusal to execute a waiver of immunity as a "conclusive and self-evident . . . admission" of unwillingness to account for his conduct in office and argues that this asserted unwillingness is enough to require a conclusion that he is unfit to hold the particular offices which the appellant seeks to have him forfeit. Brief for Appellant, p. 25 n.*. These assertions defy logic and law.

Mr. Cunningham's unwillingness to sign a waiver of immunity in a secret grand jury session where he had no right to counsel, which was run by a politically motivated appointee of the opposite party—whose conduct in office has caused judicial warnings and alarms,[9] is not susceptible of any particular interpretation, let

[8] First amendment freedoms need "breathing space". The atmosphere in Mr. Nadjari's grand juries was positively choking. See *People* v. *Brust*, — Misc.2d —, — N.Y.S. 2d — (1976), New York Law Journal, Dec. 2, 1976, p. 12; *People* v. *Di Sapio*, — Misc. 2d —, — N.Y.S.2d — (1976), New York Law Journal, Dec. 20, 1976, p. 1.

[9] See, *e.g.*, *People* v. *Brust*, *supra*; *People* v. *Di Sapio*, *supra*; *People* v. *Cunningham*, *supra*. In his December 22, 1976 opinion in *Cunningham*, Judge Sandler found that the grand jury tactics of Mr. Nadjari and his associates in the *Cunningham* case would have required dismissal even if there had been evidence of wrongdoing. Slip Opinion, p. 22, N.Y. Law Journal, Dec. 23, 1976 at p. 13.

alone the conclusive one proposed by the appellant. At the very least one ought to view this matter differently from a refusal to account to some party body, or even to a public legislative inquiry. Compare *Wieman* v. *Updegraff,* 344 U.S. 183 (1952). Mr. Cunningham, it bears noting, was not asked a single question before the grand jury other than whether he would sign the waiver of immunity.

Slochower v. *Bd. of Higher Education,* 350 U.S. 551 (1956), establishes that the appellant's position is meritless.[10] Conclusive presumptions have, moreover, been generally disfavored in this Court's decisions, *e.g.*, *Heiner* v. *Donnan,* 285 U.S. 312 (1932); *Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973), and all presumptions which give more weight to facts than they can properly bear have been seriously questioned. *E.g., Leary* v. *United States,* 395 U.S. 6 (1969); *United States* v. *Romano,* 382 U.S. 136 (1965).

The inference—not even a presumption—permitted in *Baxter* v. *Palmigiano,* 425 U.S. 308 (1976), was expressly limited to permitting the trier of fact in a routine prison discipline case to give silence such limited weight as it deserved in light of an entire record developed in accordance with due process standards.

IV. If the Decision Below Is Reversed, It Must Be With Directions To Enjoin the State from Exacting the Consequences of New York Election Law § 22 in Any Case.

Appellee, relying on prior decisions of this Court, declined to execute a waiver of immunity. A reversal, rather than ordering the complaint dismissed, would properly direct that appellee be given another oppor-

[10] See also *Sheiner* v. *State,* 82 So.2d 657, 662 (1955).

tunity to appear before the grand jury (which is now directed by a different Special Prosecutor), or that a hearing be held concerning appellee's reasons for refusing to sign the waiver of immunity. See generally *Maness* v. *Myers*, 419 U.S. 449 (1975).[11]

CONCLUSION

In light of the foregoing the judgment below should be affirmed.

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[11] A similar approach was taken in *Gelbard* v. *United States*, 408 U.S. 41 (1972), in which respondent Egan had, before the grand jury, invoked an objection based on alleged wiretapping. The wiretapping was later denied by the Solicitor General, which rendered Egan's claim invalid. The Court's judgment had the effect of giving her another opportunity to appear before the grand jury, and all members of the Court agreed this was a proper procedure. See 408 U.S. at 72 n. 1 (Rehnquist, J., dissenting). See also 408 U.S. at 61-62 n. 23.